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No. 73-2031

In the
Supreme Court of the United States
October Term, 1974

The Toledo, Peoria & Western Railroad Company,
Petitioner,

vs.

Charles N. Wasson, doing business as Wasson Towing Company, Owner of the Motor Vessel DEL RIO, and Wasson Towing Service, Inc., Bareboat Charterer of the Motor Vessel DEL RIO, For Exoneration From or Limitation of Liability,
Respondent and Cross Petitioner.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2035

The Toledo, Peoria & Western Railroad Company,

Petitioner,

vs.

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RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents pray that the Writ of Certiorari prayed for by petitioner herein to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on April 17, 1974 shall not issue.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THERE EXISTS NO CONFLICT BETWEEN THE COURTS OF APPEALS

The alleged conflict between the decision below and the decision of the Ninth Circuit in *Oregon* v. *Tug Go-Getter,* 468 F.2d 1270 (9th Cir. 1972) is illusory. The *Go-Getter* case involved a bridge built in 1954 under a permit which *did not require pier protection.* 468 F.2d at 1272, 1273. In the present case, the applicable 1936 War Department permit *required* that the bridge maintain pier protection. This distinction makes *Go-Getter* an entirely different case than here presented, where the applicable common law authorities, federal permit and governing Illinois statute required adequate pier protection, in good repair. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.,* 205 F. 732 (4th Cir. 1913); *M. P. Howlett, Inc.* v. *The Catherine Carroll,* 56 F. Supp. 466 (D.C.N.Y. 1944); *City of Milwaukee* v. *Kensington S.S. Co.,* 199 F. 109 (7th Cir. 1912); *Wilmington Transp. Co.* v. *Standard Oil Co.,* 53 F. 2d 787 (9th Cir. 1931); *Cleveland-Cliffs Iron Co.* v. *Grosse Isle Bridge Co.,* 239 F. Supp. 872 (E.D. Mich. 1964); *The Fort Fetterman* v. *South Carolina State Hwy. Dept.,* 261 F.2d 563 (4th Cir. 1958).

There exists no meaningful conflict among the Courts of Appeals on this issue.

II.

THE RULE OF DIVIDED DAMAGES IS WELL ESTABLISHED

In 1855 the United States Supreme Court unanimously settled on the Admiralty principle of divided damages, saying:

> "Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault. The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss.... This seems now to be the well-settled rule in English Admiralty. (cases omitted)
>
> Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." *The Catherine* v. *Dickinson,* 58 U.S. (17 How.) 170, 177-78 (1855).

The rule of equal division in cases of mutual fault has been consistently adhered to ever since. Thus in 1952 this Court said,

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that mutual wrong-doers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third parties." *Halcyon Lines* v. *Haenn Ship C. & R. Co.,* 342 U.S. 282, 284 (1952).

The present case offers no good reason to abandon the century-old rule. The sole fault attributed to Respondent — Towing Company below was in making up its tow three barges wide. The fault of the Railroad was found to be

its failure to maintain 166 feet of sheer fencing and pier protection, the purpose of which has been recognized by many courts:

> "The bluff of (the vessel's) bow struck the fender piling designed to prevent collisions between vessels and the northernmost pier, or to break the force of such collisions as might take place.
>
> • • •
>
> Properly placed and maintained piling will usually keep vessels from coming into contact with the piers and abutments of drawbridges, and will greatly reduce the destructive effects of many of the collisions which cannot be altogether prevented. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.*, 196 F. 548, 549, 550-51 (D. Md. 1912), *aff'd*, 205 F. 732 (C.A. 4, 1913).
>
> It is common knowledge that fenders are provided at bridge abutments, both for the protection of the abutment, and the boats passing through. *M. P. Howlett, Inc.* v. *The Catherine Carroll*, 56 F. Supp. 466, 476 (D.C.N.Y. 1944)

The record also indicates that this was the purpose of sheer fencing here.

> "Q. At that time, Captain, the time of this accident, was there any other pier protecting this east channel or pier number 3 of the TP&W Bridge? I have in mind either protective cells, such as we have depicted here at the Franklin Street Bridge, pile clusters, sheer fencing or any other pier protection.
>
> A. No, sir, none whatsoever. It was bare concrete pier.
>
> Q. Is this sheer protection also referred to as a guidewall? Is that a synonym for 'sheer protection?'
>
> A. Yes, sir, that's the purpose of a sheer fence, to sheer a tow off a protected pier or such.

Q. To straighten out the tow and guide it through a channel, is that fair to say?
A. Yes, absolutely."
A.58

In view of the foregoing, Circuit Judge Stevens concluded below, "I have no doubt that there was mutual fault because the railroad completely failed to discharge its duty to provide adequate pier protection.... I therefore agree that the damages should be divided." (Pet. A-23). Petitioner has not presented any reasons which indicate that such a conclusion was incorrect.

Finally, Petitioner quotes the language of *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) to support its petition here. But that reliance is misplaced since *Moragne* dealt solely with the right to recover for wrongful death under general maritime law, and had nothing to do with the issues raised here.

To say that because of Petitioner's misconception of legal causation, there exist significant and recurring problems concerning the divided damages rule is to extend the purposes of the certiorari procedure beyond reasonable limits.

Moreover, even if this Court were to conclude that the established maritime rules of divided damages were appropriate for review, this is an inappropriate case. Here this bridge had stood for 113 years, and withstood the hammerings of river traffic because, and only so long as, adequate pier protection was maintained. Respondent deliberately stopped repairing the sheer fencing, prior to this casualty. (A.206, 207, 209) Its officers knew that endangered the bridge piers. (A.214, 215) Replacement with a steel and concrete cell would have cost $30,000 at

most. (A.209) If the expense of $30,000 had been incurred, as was the duty of the bridgeowner, its damages here would have been $30,000 or less. Accordingly if damages are not to be equally divided as decreed by the Court of Appeals, then the railroad's damages should be limited to $30,000 — instead of over $400,000. That, however, is far from a typical case that arises in connection with the divided damages rule.

III.

THE PENNSYLVANIA RULE WAS PROPERLY APPLIED BELOW

For the reasons stated by the Court of Appeals, in a scholarly opinion, application of the *Pennsylvania Rule* was proper.

Moreover here the cause in fact, and proximate cause, of the damages complained of was plainly the railroad's failure to maintain its pier protection in good order and condition. The purpose of such sheer fencing is to sheer vessels off and thus prevent impacts with bridges. (A.58) Accordingly it was not strictly necessary for the Court of Appeals to decide the case on a *Pennsylvania Rule* basis, since another basis existed — that the absence of pier protection was the actual proximate cause of the railroad's damages.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for the issuance of its writ of certiorari to review the decision below.

Respectfully submitted,

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